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No. 84-1360

In the Supreme Court of the United States

October Term, 1984

THE CITY OF RENTON, ET AL.,
Appellants,

vs.

PLAYTIME THEATERS, INC., A WASHINGTON CORPORATION, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF JACKSON COUNTY, MISSOURI, IN SUPPORT OF THE PETITIONERS

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MOTION OF JACKSON COUNTY, MISSOURI, A POLITICAL SUBDIVISION OF THE STATE OF MISSOURI, FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Jackson County, Missouri, a first class county having a constitutional charter form of government in the State of Missouri, comes now by and through its Office of the County Counselor, and respectfully moves for leave to file a brief *amicus curiae* in support of the petitioners in No. 84-1360, *The City of Renton, et al. v. Playtime Theaters, Inc., et al.*, as provided for in Rule 42 of the Rules of the United States Supreme Court, 28 U.S.C. Jackson County is a State political subdivision within the meaning of Rule 36.4.

INTEREST OF JACKSON COUNTY, MISSOURI

Jackson County is a first class charter county and political subdivision of the State of Missouri, operating under the authority of Mo. Const. art. VI § 18. As a home rule county, Jackson County has independent authority to enact a broad range of ordinances covering activities in the unincorporated (and, to a lesser degree, incorporated) areas of the county. Included in that authority is the power to adopt a comprehensive plan for planning and development of the unincorporated area and to enact zoning ordinances for implementation of the comprehensive plan. The unincorporated area of the County fringes on a number of growing municipalities, including Kansas City.

On September 6, 1984, the Jackson County Legislature —a 15 member legislative body elected by popular vote in four year intervals—enacted an ordinance which placed adult bookstores, adult mini motion picture theaters, and adult motion picture theaters in "E" zones (light commercial), with the proviso that such businesses could not be located within 1500 feet of churches or schools. Extensive community concern about the presence of such operations and their impact on community institutions and nearby land values prompted the enactment of the ordinance. Definitions, as well as the concept, were derived in part from the Detroit ordinance upheld in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

Jackson County is now involved in litigation under 42 U.S.C. §1983, in which an adult bookstore operator affected by the ordinance seeks to permanently enjoin the ordinance's enforcement and asks for punitive damages against the County Legislators individually (*People Tags, Inc., et al. v. Waris, et al.*, Case No. 85-0028-CV-W-9, U.S.

District Court for the Western District of Missouri, Western Division). The Plaintiffs base their complaint primarily upon comments made by County Legislators during public hearings held prior to the ordinance's enactment and rely in part upon *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527 (9th Cir. 1984).

SUMMARY OF ARGUMENT

The Court of Appeals' opinion burdens local governments with a new and unreasonable burden of proof in their defense of police power ordinances. Under the Ninth Circuit's approach in this case, a reviewing court may extract from an ordinance's public record the "inference" of legislative intent to suppress free expression. The Ninth Circuit does not suggest how local governments can prove the absence of such intent, especially when the inference is divined from the record by a reviewing court removed in time from the ordinance's enactment. *Amicus* Jackson County contends that this "inference" is in fact a conclusive presumption which adult entertainment businesses can use to frustrate legitimate efforts to regulate the location of commercial enterprises.

This new presumption concerns Jackson County for two reasons. First, it gives unrealistic credence to the colloquies and spontaneous comments that are common to legislative forums. Second, it creates a broad avenue for judicial encroachment upon legislative efforts to exercise police power and ignores the standards established by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968). Under *O'Brien* and other cases, the constitutionality of a given ordinance must be judged on the ordinance's face, not on the various claims of "illicit motivations" attributed to the ordinance by the parties challeng-

ing the ordinance. Where the challenged ordinance is an exercise of police power, an inquiry into legislative motives is an impermissible foray into a legislature's policy-making discretion.

Because the Ninth Circuit Court of Appeals has abrogated the standard of *O'Brien* and other decisions in favor of a new rule requiring local governments to rebut "inferences" culled from legislative debate by aggrieved adult entertainment vendors or by other commercial enterprises, *amicus* Jackson County urges reversal.

ARGUMENT

Separation of Powers Mandates That the Judiciary Not Use the First Amendment to Overturn Local Zoning Ordinances on Grounds of Illicit Motivations of Individual Legislators.

Amicus Jackson County is prompted to write this brief because the Ninth Circuit Court of Appeals' decision in *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527 (1984), would—if followed—place an intolerable burden on local governments seeking to exercise zoning control over commercial enterprises. In *Playtime Theaters*, the Ninth Circuit held that where the record gives rise to an inference that "a motivating factor behind the [adult entertainment zoning] ordinance was suppression of the content of speech," 748 F.2d at 537, the ordinance will be invalidated unless the inference is rebutted. This extraordinary evidentiary burden represents a serious departure from this Court's pronouncement on judicial review of legislative acts. At stake is the degree of freedom accorded to entities such as Jackson County in developing basic police power ordinances.

A. A judicial search for "suppressive intent" is acceptable only for a very narrowly defined class of cases.

In *United States v. O'Brien*, 391 U.S. 367 (1968), this Court considered the extent to which legislative motives may be examined where a statute incidentally restricts the exercise of First Amendment rights. The Court observed that inquiries into congressional motives are a "hazardous matter" and declined to void even unwise legislation "which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." 391 U.S. at 383-384. *See Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 469-470 (1981) (California statute's criminalization of intercourse with minor females was—speculation on legislative motives notwithstanding—a per se indication of statute's intent to discourage such conduct).

Thus, due to the inherent dangers in judging the enactment's compliance with the First Amendment on the weight of individual legislators' statements, such statements may be considered by Courts only for purposes of statutory interpretation or "in a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purposes." 391 U.S. at 383, n. 30. This "very limited and well-defined class of cases" is restricted to bills of attainder and other *ex post facto* forms of punishment. *Id.*

Therefore, before delving into the diverse individual motives underlying legislative police power enactments, a court must first determine that the enactment under review has the *prima facie* indicia of a punitive or penal statute. The cases cited in *O'Brien* provide very clear

guidance on making that determination. The plurality opinion in *Trop v. Dulles*, 356 U.S. 86 (1958), set forth the basic test:

> If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.

356 U.S. at 96 (Warren, C.J.).

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), expanded upon *Trop* by establishing a multi-factor test for distinguishing regulatory and penal statutes. Under *Kennedy*, a reviewing court must consider whether the sanction imposed by statute

(a) involves an affirmative disability or restraint,

(b) has historically been regarded as punishment,

(c) comes into play only on a finding of scienter,

(d) operates to promote retribution or deterrence,

(e) applies to behavior that already is a crime,

(f) has an alternate purpose to which it may rationally be connected,

(g) appears excessive in relation to the alternate purpose assigned.

See 372 U.S. at 168-169.

Courts may consider legislative motivations in areas such as racial discrimination, where the risks of misreading legislative intent may not be as high. *See, e.g., Hunter v. Underwood*, 53 U.S.L.W. 4468 (Apr. 16, 1985) (testimony of historians concerning 1901 Alabama Constitutional Convention revealed uncontroverted discriminatory intent behind state constitution's disenfranchisement of certain convicts). However, where a party contests an ordinance on grounds of suppressive intent, the traditional test set forth in *O'Brien, Trop,* and *Kennedy* controls.

The thrust of *O'Brien* and its predecessors is to preempt the extensive second-guessing of police power ordinances that would go with an unlimited search for "illicit motivations". The Ninth Circuit's holding in *Playtime Theaters* gives adult entertainment businesses a formidable weapon with which to frustrate legitimate efforts by localities to control the otherwise unrestrained spread of adult bookstores and theaters, or any other commercial enterprises which might be able to lay some claim of First Amendment protection. Vendors of adult materials may now, in the course of §1983 suits or similar actions, force local governments to prove the existence of a negative; that is, to show that the legislature as a whole did not in fact intend to suppress free expression.

Unfortunately, the *Playtime Theaters* court did not offer any guidance on how a locality, once branded with an inference of suppressive intent, can prove that it didn't intend to suppress. *Amicus* Jackson County submits that the Ninth Circuit couldn't offer such guidance because no locality could reasonably expect to meet such a burden of proof. The "inference" is in fact a conclusive presumption, one that is derived by a detached court removed in time from the statute's enactment and based upon the statements of individual legislators—a practice rejected in *O'Brien*.

The degree to which the Ninth Circuit has departed from *O'Brien* is illustrated by the case law relied upon in the *Playtime Theaters* opinion. The *Playtime Theaters*

court based its new burden of proof on three other Ninth Circuit opinions: *Tovar v. Billmeyer,* 721 F.2d 1260 (1983), *Ebel v. City of Corona,* 698 F.2d 390 (1983), and *Lydo Enterprises, Inc. v. City of Las Vegas,* 745 F.2d 1211 (1984). The common holding in all of those cases was that the enacting body must have a substantial governmental interest unrelated to the suppression of free expression. That holding is firmly rooted in this Court's decisions and is not questioned by Jackson County. What Jackson County questions is the *Playtime Theaters* court's mutation of that basic principle into a carte blanche expedition into the amorphous world of legislative motives. It is one thing to say that government has limited power to suppress free expression (*Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980), cited in *Ebel,* 698 F.2d at 393); it is an entirely different matter to then say that a municipality may be required to substantiate a benign legislative motive for every zoning ordinance in which an aggrieved landowner can show an "inference" of suppressive intent.

Perhaps the greatest danger posed by the *Playtime Theaters* inference is that it logically would apply to the large number of police power ordinances that local governments enact for matters other than zoning. Political subdivisions such as Jackson County necessarily enact and amend laws to protect the public in, *e.g.,* its use of public parks and streets. Similarly, localities regularly implement legislation concerning public nuisances, condemnation, and quasi-criminal offenses such as disorderly conduct. If, as the Ninth Circuit suggests, a party seeking to invalidate a zoning ordinance may do so by invoking the statements or arguments of individual legislators, Jackson County questions its ability to enact and effectively

implement other basic police power ordinances. The *Playtime Theaters* holding is so broad that even existing police power ordinances are vulnerable to the vague inferences of illicit motivations to which the Ninth Circuit gives so much impact.

Notably, this Court recently upheld federal police power regulation in the form of a National Park Service rule which prohibited camping in certain national parks. *Clark v. Community for Creative Non-Violence,* 468 U.S. ....., 82 L. Ed. 2d 221 (1984). Importantly, *Clark* upheld the regulation as a reasonable time, place, and manner restriction and based this holding on the effect—not subjective intent—of the regulation. 82 L. Ed. 2d at 228 (regulation not a ban on sleeping generally, given existence of alternative sites for camping).

Clark reflects this Court's traditional emphasis on the facial review of legislation, especially in the area of police power. Given the dangers of ill-defined searches for suppressive intent or other illicit motivations, no other approach would be consistent with the separation of powers mandated by the Constitution. A reviewing court may not seek to void police power ordinances based upon an inference of suppressive intent. The court must instead confine itself to the more proper role of determining whether the enactment's *terms and effect* comply with constitutional criteria.

B. A zoning ordinance placing situs restrictions on specific categories of land use—including adult entertainment businesses—does not fall within the class of cases allowing a search for suppressive intent.

1. Zoning ordinances are classic examples of local police power and as such are prima facie regulatory ordinances.

By definition, zoning laws are regulatory devices implemented pursuant to police power and in furtherance of public welfare. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Deprivation of property rights does not independently alter the nature or validity of this power. *See Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962). Indeed, even where the regulation is unreasonable or exceptionally onerous, the offending ordinance would be struck down as an unconstitutional taking, not as a punitive ordinance. *Cf. Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), *Wermager v. Cormorant Township Board*, 716 F.2d 1211 (8th Cir. 1983). Correspondingly, regulatory acts such as zoning ordinances do not have the penal indicia listed in *Kennedy; e.g.*, scienter, historic status as punishment, etc.

The decision on how and in what form the police power will be exercised is uniquely a legislative one. *Hawaii Housing Authority v. Midkiff*, ... U.S. ....., 81 L. Ed. 2d 186 (1984), concisely summarizes the concept of judicial deference to legislative determinations on police power. Although *Midkiff* dealt with the constitutionality of an eminent domain statute, it necessarily involved an assessment of how courts should treat the broader subject of police power. The Court's opinion relies heavily upon *Berman v. Parker*, 348 U.S. 26 (1954), and that case's discussion of police power:

> We deal, in other words, with what traditionally has been known as police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, *when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs.*

348 U.S. at 32, emphasis supplied.

Thus, in considering an ordinance which on its face is an exercise of police power—surely a "legitimate governmental purpose" within the meaning of *Trop*—a court may not look beyond the ordinance's face for possible suppressive intent of councilmen supporting the ordinance. Even if zoning ordinances regulating the location of adult bookstores and theaters do not garner the deference given other police power ordinances from *Village of Euclid* to *Midkiff*, they at least constitute non-penal ordinances within the meaning of *O'Brien*.

2. The regulatory nature of zoning ordinances is not altered by their application to adult entertainment businesses.

The nature of Renton's zoning ordinance—regulation of adult entertainment locations—does not alter the *O'Brien* standard of review. Under *Paris Adult Theatre*

I v. Slaton, 413 U.S. 49 (1973), obscene material is not protected by the First Amendment as a limitation on state police power by virtue of the Fourteenth Amendment. In fact, this Court recognized certain inherent state interests "in stemming the tide of commercialized obscenity. . . ." 413 U.S. at 57. Such interests include that of "the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." 413 U.S. at 58.

Thus, nothing about First Amendment/pornography cases alters the degree of deference traditionally granted to exercises of police power. Indeed, *Paris Adult Theatre I* suggests a built-in deference to pornography-related ordinances, given the recognized community interest in the regulation of pornography. Although pornography ban cases like *Paris Adult Theatre I* differ from "adult entertainment" regulation cases such as in *Playtime Theaters* (due mainly to the evidentiary findings required in "ban" ordinances), the rationale for deference remains the same. In lieu of something on the face of the ordinance suggesting that *ex post facto* punishment is being imposed upon specific parties, the *Paris Adult Theatre I* rationale controls.

C. As a matter of public policy, statements by legislators should not be used as barometers for suppressive intent.

As a practical matter, it is unfair to hold local legislators to superhuman standards of rationality and diplomacy, especially if the yardstick is that of the public debate on the challenged ordinance. Legislators do not always speak with legal precision or diplomatic aplomb; nor, as elected representatives, should they be expected to place such oratorical concerns above the needs of their constitu-

ents as long as their *actions* comport with constitutional norms. In *Tenney v. Brandhove,* 341 U.S. 367 (1951), which established absolute immunity for legislators from civil liability in damages, this Court made the observation that "one must not expect uncommon courage even in legislators. . . . In times of political passion, dishonest or vindictive motives are readily attributed legislative conduct and as readily believed. Courts are not the place for such controversies." 341 U.S. at 377-378.

Correspondingly, courts are not the place for seeking underlying motivations for a zoning restriction on the location of adult bookstores and theaters, especially where that ordinance on its face is a valid exercise of police power lacking any facial indicia of punitive intent. To hold otherwise would be to signal other localities that anything said during legislative deliberations can be turned upon the locality in a later civil rights action and, perhaps, on the individual legislators. Such scrutiny would chill legislative deliberations (at least on the record) and subjugate legislative policy judgment to that of the judiciary. To do so would be foreign to the representative democracy characterized by local governments and anathema to the concept of separation of powers.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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